

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL AND TOBACCO COMMISSION**

IN THE MATTER OF)	
THE PERMIT OF)	
)	
FREEDOM OIL, LLC)	
d/b/a FREEDOM EXPRESS #4)	PERMIT NO. DL43-22895
750 SOUTH STATE ROAD 13)	
NORTH WEBSTER, INDIANA 46555)	
)	
Applicant.)	

**PROPOSED
FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. BACKGROUND OF THE CASE

The Applicant, Freedom Oil, LLC d/b/a Freedom Express #4 (“Applicant”), located at 750 South State Road 13, North Webster, Indiana 46555, permit number DL43-22895, is the Applicant for a type 115¹ Alcohol & Tobacco Commission (“Commission”) permit. The application was assigned to the Alcoholic Beverage Board of Kosciusko County (“Local Board”). The Local Board held a hearing on November 1, 2007 and voted three (3) to one (1) to deny the application. The Commission adopted the Local Board’s recommendation on November 20, 2007.

The Applicant filed a timely Notice of Appeal and the matter was assigned to Commission Hearing Judge U-Jung Choe (“Hearing Judge”). The matter was set for hearing on January 22, 2008 and at that time, witnesses were sworn, evidence was heard and the matter was taken under advisement. The Hearing Judge, having reviewed the tape-recorded transcript of the Local Board hearing (“LB Hearing”), the evidence submitted to the Commission during the appeal hearing (“ATC Hearing”), and contents of the entire Commission file (“ATC File”),

¹ Beer and wine (grocery) dealer located in an incorporated area. Ind. Code § 7.1-3-5-2(a).

now tenders her Proposed Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On or about November 6, 2006, the Commission received Applicant's Application for a New or Transfer Permit.

2. The Local Board held a hearing on February 1, 2007 and voted three (3) to zero (0) to deny the application.

3. The Commission adopted the Local Board's recommendation on February 20, 2007.

4. On March 6, 2007, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.

5. No remonstrators filed a petition for intervention as remonstrator, as required by 905 IAC 1-36-2.

6. On May 15, 2007, the Hearing Judge conducted a hearing regarding this appeal.

7. On August 8, 2007, the Hearing Judge issued an Order Remanding Case to Local Board for Rehearing and Further Investigation.

8. The Local Board held a hearing on November 1, 2007 and voted three (3) to one (1) to deny the application.

9. The Commission adopted the Local Board's recommendation on November 20, 2007.

10. On December 4, 2007, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.

11. No remonstrators filed a petition for intervention as remonstrator, as required by 905 IAC 1-36-2.

12. On January 22, 2008, the Hearing Judge conducted a hearing regarding this appeal.

II. EVIDENCE BEFORE THE LOCAL BOARD

A. The following individuals testified before the Local Board in favor of the Applicant in this cause:

1. Greg Cobb, Applicant.

B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Unknown, Remonstrator²;
2. Larry Kinsey, Remonstrator and resident of North Webster; and,
3. Helen Hoy, Remonstrator and resident of North Webster.

C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

None.

III. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Greg Cobb, Applicant.

² The name of the remonstrator could not be distinguished on the audio recording of the LB Hearing.

B. The following individuals testified before the Commission against the Applicant in this cause:

None.

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Exhibit 1 – Petitions in Support of the Applicant containing approximately six hundred sixty (660) customer signatures; and,
2. Exhibit 2 – Diagram of interior of proposed permit premises.

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

V. FINDINGS OF FACT

1. The Applicant, Freedom Oil, LLC d/b/a Freedom Express #4, 750 South State Road 13, North Webster, Indiana 46555, permit number DL43-22895, is the applicant for a type 115 Commission permit. (ATC File).

2. The Applicant maintains a reputation for decency and law obedience in the community in which it conducts business. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10. (ATC Hearing).

3. There is a need for the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(a). (LB Hearing and ATC Hearing).

4. The neighborhood and community desire to receive the services of the Applicant at the proposed permit premises. 905 IAC 1-27-4(b). (LB Hearing and ATC Hearing).

5. The services of the Applicant at the proposed permit premises would have a positive impact on the neighborhood or community in which it is proposed to be located. 905 IAC 1-27-4(d). (LB Hearing and ATC Hearing).

6. The proposed permit premises is more than 200 feet (200') from a church or school. Ind. Code § 7.1-3-21-11. (ATC File).

7. The Applicant sells flour, sugar, bread, packaged meats, soda, chips, snacks, coffee and other items customarily found in a grocery store. (ATC Hearing).

8. The proposed permit premises is not in a residential district as referred to in Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1. (LB Hearing and ATC Hearing).

9. The Applicant's current annual gross grocery sales are expected to be at least One Hundred Fifty Thousand Dollars (\$150,000.00). (ATC Hearing).

10. A substantial portion of the business carried on or to be carried on at the proposed permit premises is in the nature of the Applicant's main business function as a grocery/convenience store. Ind. Code § 7.1-3-1-19. (LB Hearing and ATC Hearing).

11. The Applicant's business satisfies the "character of business" test. (LB Hearing and ATC Hearing).

12. The Applicant's stores are similar to stores of competitors holding alcoholic beverage permits in Indiana. (LB Hearing, ATC Hearing and ATC File).

13. The Applicant submitted in excess of six hundred sixty (660) signatures of persons in favor of the issuance of the permit and who frequent the business of the Applicant. (ATC Hearing).

14. Thirteen (13) persons appeared at the Local Board Hearing to remonstrate against the issuance of this permit. No remonstrators appeared at the ATC Hearing to remonstrate against the issuance of this permit. No other evidence was presented to indicate that there is no need or desire in the community for the permit. (Local Board Hearing; ATC Hearing; ATC File).

15. The weight of the evidence, which includes petitions submitted by the Applicant, witnesses' testimony concerning customer inquiries, and the availability of Type 115 permits in Kosciusko County, indicates that there is a need and desire in the community for the Applicant to obtain the permit. (Local Board Hearing; ATC Hearing).

16. Any Finding of Fact may be considered a Conclusion of Law if the context so warrants.

VI. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over this matter pursuant to Ind. Code § 7.1-1-2-2 and Ind. Code § 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code § 7.1-3-1-4.

3. The Commission is authorized to act upon proper application. *Id.*

4. The Hearing Judge may take judicial notice of the Commission file relevant to a case, including the transcript of proceedings and exhibits before the local board. 905 IAC 1-36-7(a).

5. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the Commission including a public hearing, and a review of the record and documents in the Commission file. Ind. Code § 7.1-3-19-11(a); 905 IAC 1-36-7(a), -37-11(e)(2); *see also* Ind. Code § 4-21.5-3-27(d).

6. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noticed in the proceeding. 905 IAC 1-37-11(e)(2); Ind. Code § 4-21.5-3-27(d).

7. The Applicant is a fit and proper applicant, has maintained a reputation for decency and law obedience and is well qualified to hold an alcoholic beverage permit under Indiana law. 905 IAC 1-27-1 and Ind. Code § 7.1-3-9-10.

8. Applicant is of good moral character and in good repute in the community in which it does business and is qualified to hold the permit it seeks. Ind. Code § 7.1-3-4-2(a)(2)(A).

9. The proposed permit premises are not in a residential district. Ind. Code § 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises are more than 200 feet (200') from a church or school. (ATC File). Ind. Code § 7.1-3-21-10 and Ind. Code § 7.1-3-21-11.

11. The Applicant is not disqualified from holding a Commission beer and wine grocery permit. Ind. Code § 7.1-3-4-2; Ind. Code § 7.1-3-5-2 and Ind. Code § 7.1-3-15-2.

12. In determining whether to issue a permit, the Commission may consider the geographic desirability of a proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

13. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

14. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a).

15. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b).

16. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

17. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b).

18. There is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4 (a).

19. The neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b).

20. The Commission may issue an alcoholic beverage permit to the proprietor of an establishment when it appears to the satisfaction of the Commission that a substantial portion of the business carried on at the permit premises is in the nature of the applicant's main business function in the premises. Ind. Code § 7.1-3-1-19. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 829 (Ind. App. 1982).

21. The Commission may issue a beer and wine grocery permit to an applicant when a substantial portion of the applicant's business in the premises is in the nature of a grocery store. Ind. Code § 7.1-3-5-2; Ind. Code § 7.1-3-1-19. *Id.*

22. The phrase "in the nature of the applicant's main business function" as applied in Ind. Code § 7.1-3-1-19 to grocery stores means the retail sale of products typically found in an Indiana grocery store. See *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 832 (Ind. App. 1982).

23. The term "grocery store", in common usage, means a building or structure where groceries are kept for sale. *Goldstine v. State*, 103 N.E.2d 438, 442 (Ind. App. 1952).

24. The word "substantial", as used in Ind. Code § 7.1-3-1-19, means something more than a nominal amount, something more than seeming or imaginary, it does not mean fifty percent (50%) or more. *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982).

25. The phrase "in the premises", as used in Ind. Code § 7.1-3-1-19, means a building or part of a building in which alcoholic beverages are authorized to be kept or sold. Ind. Code § 7.1-1-3-20.

26. Where an applicant carries and sells a large number of non-taxable grocery items as well as ordinary household products and miscellaneous items not inconsistent with the sales of a typical grocery store, such sales are substantial within the meaning of the "character of business" test. Ind. Code § 7.1-3-1-19.

27. The Applicant has established that a substantial portion of its business at the proposed permit premises is in the nature of a grocery store.

28. The Applicant has submitted substantial evidence that it meets the "character of business" test for a grocery store and is qualified to hold a Commission Type 115 beer and wine grocery permit.

29. The law does not permit the denial of an alcoholic beverage permit because an applicant sells fuel and oil products. *Kocolene Oil Corporation v. Indiana Alcohol and Tobacco Commission*, Cause No. CV781-322 (1984).

30. All laws shall be general and administered with uniform application throughout the State. Ind. Constitution, Art. IV, Sec. 23; *See also, Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 831 (Ind. App. 1982).

31. To deny the application to Applicant while granting other similarly situated applicants' applications would be arbitrary and capricious and otherwise not in accordance with the law. Ind. Code § 7.1-3-19-11.

32. The Local Board denied this application without sufficient evidence to support a finding that this permit should not be issued.

33. A local board's recommendation is clearly erroneous when there is a lack of substantial evidence to support the recommendation. Ind. Code § 7.1-3-19-11.

34. The Commission may decline to follow the recommendation of a local board where the recommendation is not based upon substantial evidence. *Id.*

35. The Applicant has submitted substantial evidence that it is qualified to hold a Commission Type 115 grocery beer and wine permit. (LB Hearing and ATC Hearing).

36. The Commission may reverse a local board's action in denying an application for a permit if it finds that the local board's decision was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; or (d) without observation of procedure required by law, or unsupported by substantial evidence. Ind. Code § 7.1-3-19-11.

37. The Local Board's action in denying the application of the permit of this Applicant in this matter was (a) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (b) contrary to constitutional right, power, privilege, or immunity; (c) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; (d) without observance of procedure required by law; and/or (e) unsupported by substantial evidence.

38. Any Conclusion of Law may be considered a Finding of Fact if the context so warrants.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to recommend denial of the permit application of the Applicant in this matter was arbitrary and capricious, not based on substantial evidence and contrary to law and cannot be sustained. It is further Ordered, Adjudged and Decreed that that the evidence adduced at the ATC Hearing was in favor of the Applicant and against the recommendation of the Local Board. The appeal of Applicant, Freedom Oil, LLC d/b/a Freedom Express #4, 750 South State Road 13, North Webster, Indiana 46555 for the application of this Type 115 permit no. DL43-22895 is approved, the recommendation of the Local Board in this matter is reversed, and the permit applied for herein is hereby GRANTED.

DATE: March 12, 2008

U-Jung Choe, Hearing Judge